IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-61

TOWN OF MASHPEE, ET AL., *Petitioners,*

v.

MASHPEE TRIBE, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent respectfully prays that the writ of certiorari sought by the cross-petition in this case be denied for the following reasons.

ARGUMENT

1. The issue raised (divided by petitioners into three) was not reviewed by the Court of Appeals, so that review by this Court is not yet appropriate. Pet. 40a.

2. The decision of the District Court was correct. As petitioners note, the District Court's decision on this issue was based on a like determination by the court in *Narragansett Tribe of Indians* v. *Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798, 808-09 (D.R.I. 1976). That court held that the exception for Indians "surrounded

by settlements" of U.S. citizens did not apply to claims of tribes under the Nonintercourse Act. That conclusion was correct for the following reasons.

A. The exception originated with the 1793 Indian Trade and Intercourse Act, 1 Stat. 329.[1] It was reenacted without change in the Acts of 1796, 1 Stat. 469 § 19; 1799, 1 Stat. 743 § 19; and 1802, 2 Stat. 139 § 19. The legislative history of the 1793 Act indicates that the use of the word "Indians" in the exception was a deliberate substitution for the words "any tribe." The original bill which became the 1793 Act had excepted trade and intercourse with "any tribe" surrounded by citizens settlements. The bill was amended before passage to substitute the word "Indians." National Archives Record Group 46, Records of the Senate: Original Bill and Amendments.

B. The Nonintercourse provisions of the 1793-1802 statutes required that Congress control extinguishment of the land title of "any Indian, or nation, or tribe of Indians, within the bounds of the United States." 1 Stat. 329 § 8 (1793); 1 Stat. 469 § 12 (1796); 1 Stat. 743 § 12 (1799); 2 Stat. 139 § 12 (1802). Both tribal and individual title were protected, while the citizens settlements exception excluded only individual Indians.

Petitioners argue that the words "any Indian" have the same meaning as "Indian tribe." Pet. 13. But in 1833 Attorney General Taney held, to the contrary, that it was the words "any Indian" that brought individual Indians within the purview of the Nonintercourse Act, and in 1834 Congress eliminated the protections for individual Indians by deleting these words. 2 Op. A.G. 587 (1833). *See also Jones* v. *Meehan,* 175 U.S. 1, 12-13 (1899).

[1] The Act of 1790, 1 Stat. 137, contained a similar exception but only from the particular terms of § 1, concerned with licensing of trade in goods with Indians. That origin suggests that such trade was at least the dominant reason for the exception.

Petitioners invoke this Court's decision in *Wilson* v. *Omaha Indian Tribe,* —— U.S. —— (June 20, 1979), where the Court held that the words "Indian" and "Indians" in section 22 of the 1834 Trade and Intercourse Act (25 U.S.C. 194) (which places the burden of proof on the "white person" in certain cases involving Indians) include tribal land holdings. That conclusion is distinguishable, however. It concerned a different section, which originated at a different time (1822). The Court construed the section to effect its purpose and refrained from applying the conclusion even to the one other section of the 1834 Indian Trade and Intercourse Act, which also referred to "white persons." *Cf.* concurring opinion in *Wilson* v. *Omaha Indian Tribe, supra.* Unlike the instant case, there was no helpful legislative history for § 22. The purpose of the Nonintercourse Acts was to assert a congressional monopoly over tribal title. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974). This purpose is totally frustrated by petitioners' interpretation. If the citizens settlements exception applied at all to the Nonintercourse Acts, it was a proviso creating an exception to their policy and must be strictly construed. *United States* v. *McElvain,* 272 U.S. 633, 639 (1926).

C. The foregoing analysis is reinforced by the terms of the 1834 Indian Trade and Intercourse Act, 4 Stat. 729. When the Nonintercourse provision was amended to apply only to tribes (§ 12, now 25 U.S.C. 177), the

citizens settlements exception was deleted. *Jones* v. *Meehan, supra.*

D. An independent reason why the conclusion below was correct is that the federal policy disabling tribes from conveying land to anyone except the United States or with its approval exists independently of the statutes. In *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), this Court invalidated land purchases from Indians made in the 1770's, before passage of the Nonintercourse Acts. In two 1978 decisions, the Court expressed the view that when the tribes came under the sovereignty of the United States, their ability to transfer land was "implicitly lost by virtue of their dependent status." *United States* v. *Wheeler,* 435 U.S. 313, 326 (1978); *see, Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 209 (1978). In *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 667 (1974), the Court said:

> Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of federal law . . .

E. Another basis for the conclusion of the District Court on this issue was the additional requirement of the exception that the Indians be within the "ordinary jurisdiction" of the state. The court recognized that the Mashpees were governed by special laws and were not within the ordinary jurisdiction of Massachusetts until the last state act taking their lands made them so. Tr. 23-123.

3. Petitioners make an erroneous claim about the nature of the issue they raise. They say that cases such as this one based on the Indian Nonintercourse Act (25 U.S.C. 177) had been "exceedingly rare" east of the

Mississippi until "recently." Pet. 7-8. We do not know the standards for this claim, but it seems untrue based on reported decisions alone. *See, The New York Indians,* 72 U.S. (5 Wall.) 761, 771 (1867); *United States* v. *Boylan,* 265 F. 165 (2d Cir. 1920), *appeal dismissed,* 257 U.S. 614; *Deere* v. *St. Lawrence River Power Co.,* 32 F.2d 550 (2d Cir. 1929); *United States* v. *7405.3 Acres of Land,* 97 F.2d 417 (4th Cir. 1938); *United States* v. *National Gypsum Co.,* 141 F.2d 859 (2d Cir. 1944); *Tuscarora Nation of Indians* v. *Power Authority,* 257 F.2d 885 (2d Cir. 1958); *Federal Power Com'n* v. *Tuscarora Indian Nation,* 362 U.S. 99 (1960); *United States* v. *Devonian Gas & Oil Co.,* 424 F.2d 464 (2d Cir. 1970); *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974).[2]

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[2] Petitioners also refer to a statute of limitations respecting actions by the United States on behalf of Indians and recite an Interior Department figure on claims which could be affected as "well over 1,000." Pet. 14-15, n. 3. This statement is highly misleading. The statute, 28 U.S.C. 2415, limits all tort and contract claims by the United States on behalf of Indians. It expressly excepts actions for recovery of real property. 28 U.S.C. 2415(c). The estimate of affected cases includes trespass and other claims of every sort. Only a small number of those involve claims that land conveyances are void under the Nonintercourse Act.

CONCLUSION

For the reasons stated, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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